IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CAROL CLEMENTONI PHILLIPS	)	
	)	CIVIL ACTION NUMBER
Appellant	)	
	)	08A-07-009-JOH
v.	)	
	)	
PARTS DEPOT, INC.	)	
	)	
Appellee	)	
	)	

Submitted: November 13, 2009
Decided: March 10, 2010

MEMORANDUM OPINION

*Upon Appeal from the Industrial Accident Board - **AFFIRMED***

Appearances:

Kenneth F. Carmine, Esquire, of Potter Carmine & Associates, P.A., Wilmington Delaware, Attorney for Appellant

Scott A. Simpson, Esquire, of Elzufon Austin Reardon Tarlov & Mondell, Wilmington, Delaware, Attorney for Appellee

HERLIHY, Judge

Carol Clementoni Phillips has appealed the decision of the Industrial Accident Board finding her employer had not waived its right to reimbursement from proceeds of a third-party action. She was injured on the job in 2002 and sued the third-party tortfeasor obtaining a recovery.

Phillips and her employer, Parts Depot, Inc., entered into a commutation of benefits agreement covering that auto accident injury and a later claimed unrelated injury. Phillips had settled her third-party suit, and the commutation agreement provided Parts Depot would continue to "process" any ongoing bills from the auto accident. That part of the commutation agreement evolved into dispute of whether Parts Depot had waived its right to be reimbursed for any ongoing medical bills.

The Board determined there was no express waiver. In the absence of an express waiver and recognizing the policy behind the statute providing the employer may recoup from such third-party recoveries, this Court affirms the Board's conclusion

Factual Background

Phillips was injured during an employment related automobile accident on August 22, 2002. She sought, and was awarded, workers' compensation benefits. In addition, she filed suit against a third-party tortfeasor in connection with that accident, later settling it for $83,000. Phillips was involved in another work-related accident on February 21, 2006. The parties disagreed on the nature of the accident and whether it was a new injury or a re-aggravation of the 2002 injury.

Eventually the parties agreed to a commutation of benefits with respect to the 2006 accident in which Phillips was to receive $5,000 dollars in a lump sum for full commutation and payment of attorney's fees of $2,000. Also, as part of the commutation agreement, Phillips agreed to accept a 29% impairment to the low back and ten weeks of disfigurement benefits for the 2002 accident. This agreement translated into $18,833.76 for impairment and $2,164.80 for the disfigurement, totaling $20,998.56. Parts Depot claimed a "credit," due to compensation benefits already paid, of $78,820. Deducting the $20,998.56 from that meant Parts Depot's remaining credit against future benefits would be $57,821.44.[1] Parts Depot maintained that no money would be actually *paid* in relationship to the 2002 disfigurement and impairment agreement, but it instead would be deducted from the remaining credit to which Parts Depot was entitled by virtue of the settlement with the third-party tortfeasor under 19 *Del. C.* § 2363(e).

The parties' negotiation regarding the commutation were memorialized in a "Stipulation & Order of Commutation" and an "Affidavit of Carol Clementoni" (hereinafter referred collectively as "the Agreement").[2] Pertinent portions of the Stipulation & Order for Commutation provided:

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[1] Parts Depot App. at Ex. B-14.

[2] Because both the Stipulation and Affidavit must be presented to the Board in order for it to make a decision whether to approve the commutation, absent live testimony from Phillips, and because Parts Depot and Phillips both prepared the Affidavit (although only Phillips signed it) those two documents will be interpreted by the Court as one document for purposes of the parol evidence rule.

1. This Claimant was involved in a work accident with the Employer on 2/21/06.

2. The Claimant is currently receiving no Worker's Compensation benefits at this time; her treating doctor, Lyndon B. Caga, has concluded in his most recent report, dated October 27, 2006, that "[t]he patient is suffering from chronic low back pain and to within reasonable degree of medical probably, the pain in her back is causally related to the work injury [which occurred on August 22, 2002] and found to be permanent. The patient is partially disabled and only allowed to work part-time with light duty responsibilities."

3. The parties disagree on the nature and extent of injuries which stemmed from this accident.

4. The Claimant continues to receive chiropractic care.

5. After a series of negotiations which included counsel for the Claimant, the parties have agreed to commune all workers' compensation benefit entitlement, specifically to include all past, present and future medical benefits as well as total disability, partial disability, permanent impairment and disfigurement benefits, for the sum of $5,000.00

6. The parties specifically agree and stipulate that the amount and terms of the commutation settlement comply with Section 2358 of the statute.

7. The parties believe that this commutation is in each of its best interest, with the Claimant recognizing that she could receive less than the commutation amount and the Employer recognizing that it could be responsible for more than the commutation amount.

8. The parties agree that the period within which each party has to appeal this Order is hereby waived so that said Order is final and binding as of the date of its issuance.

9. The parties agree that a Worker's Compensation Hearing Officer may consider this Stipulation and issue an Order approving it pursuant to 19 *Del. C.* § 2301.

NOW, THEREFORE, it is hereby stipulated as follows:

a. The parties request that the Board or a Hearing Officer approve the commutation of all benefit entitlement to include, but not limited to, all past, present and future total disability, partial disability, permanent impairment, disfigurement and medical treatment expenses, related to the 2/21/06 work accident in exchange for the payment of $5,000.00 and an additional $2,000.00 in attorneys' fees made payable to Welch & Sobczyk, P.A.

b. The parties agree that the period within which either party has to appeal this Order is hereby waived so that said Order is final and binding as of the date of its issuance.

c. The parties agree that a Workers' Compensation Hearing Officer may consider this Stipulation and issue an Order approving it pursuant to 19 *Del. C.* § 2301.[3]

Pertinent portions of Phillips' affidavit stated:

2. I had a compensable work accident on 2/21/06 while employed by Parts Depot. As a result of this accident, I have received the following workers' compensation benefits:

   None, to date, in terms of total disability benefits, etc.

* * * * *

6. I have read the Stipulation and Order regarding commutation of all pending and future medical treatment entitlement, including medical treatment expenses, and I understand that this settlement will close out any and all entitlement to total disability, partial disability, permanent impairment, medical treatment expenses, and death benefits to which I may now or in the future be entitled as a result of my work injury occurring on or about February 21, 2006.

* * * * *

8. This provision (regarding the 2006 accident) specifically excludes the compensable injuries which I incurred on or about August 22, 2002, as more fully set forth in the IAB decision issued in connection with that

[3] Phillips' App. at A-22 to A-23.

August 22, 2002 Industrial Accident. To use the exact words of counsel for the Carrier, in his letter of November 2, 2006, "[f]inally, the Employer does not dispute that the medical treatment that the claimant has received to date was reasonable, necessary and related to the August 2002 work injury in question. Therefore, the claimant can continue to process her medical bills under the August 2002 claim." I fully intend to file a claim for partial disability benefits in connection with my earlier industrial accident occurring on August 22, 2002.

* * * * *

9. In exchange for releasing the workers' compensation carrier from the pending and future benefit liability outlined above, I am electing a lump-sum payment of $5,000.00. I am satisfied that a lump-sum recovery is in my best interest because: I am still entitled to any and all partial disability payments in accordance with my August 22, 2002 accident and the Carrier has agreed to continue to compensate me for all of my medical expenses, treatment, care, etc., in connection with that industrial accident.[4]

The Agreement was then submitted to the Board, which then approved the commutation. Importantly, in the Agreement, Parts Depot did not dispute that the medical treatment Phillips received was related to the 2002 Accident. Further, Parts Depot assured Phillips that she could "continue to process her medical bills under the August 2002 claim."[5] Shortly after the Board approved the commutation, Parts Depot's counsel sent a letter to Phillips counsel informing him that any expenses going forward arising from the 2002 accident would not be paid to Phillips until the § 2363 credit was exhausted.

Phillips disagreed with Parts Depot's interpretation of the Agreement. She believed that it contained a waiver of Parts Depot's § 2363 rights for reimbursement from her third-

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[4] *Id.* at A-25 to A-27 (typesetting in original).

[5] *Id.* at A-14

party recovery. She then filed a request for a hearing with the Board. That request to have a hearing was supported by Parts Depot. On May 8, 2008, both parties presented evidence to the Board. The Board noted the purpose of § 2363 was to prevent double recovery. It noted an employer could waive its right of recovery but such waiver had to be knowing and explicit. The Board found no waiver because there was no explicit language in the Agreement waiving the employer's rights under § 2363.

Parties' Contentions

Philips raises two related arguments. She first argues that the terms of the Agreement and the November 2, 2006, letter from Parts Depot's attorney to Phillip's attorney are unambiguous in Parts Depot's waiver of its credit under § 2363. Philips argues that under the parol evidence rule, additional terms are excluded. Therefore, Philips argues that the Court should find that there was a meeting of the minds in terms of the Parts Depot's waiver and find it was waived. Philips also argues that evidence produced at the hearing shows that Philips interpreted the Agreement to indicate that Parts Depot was waiving its ability to enforce a credit under § 2363. Philips argues that the Board erred because it found that there was a waiver, even though the only evidence presented indicated the intent of the Philips and her attorney at the time when the Stipulation was being negotiated.

In response Parts Depot argues that the letters presented to the Board pertained to reaching an agreement on both the 2002 and 2006 accidents and that at no point do they

acknowledge Parts Depot's willingness to waive its right to a credit against the third-party recovery. Parts Depot argues that the Board correctly decided that it had not expressly waived its rights.

Standard of Review

On appeal from the Board, the Court's role is to ascertain whether the Board's conclusions are supported by substantial evidence and free from legal error.[6] Substantial evidence is such evidence as a reasonable might accept as adequate to support a conclusion.[7] If there is substantial supporting evidence and there are no errors of law, the Board's decision will be affirmed

Discussion

The Board initially determined that § 2363(e) "creates a right by which [Parts Depot] is entitled to a credit for amounts paid to [Phillips] under the Workers' Compensation Act should [Phillips] obtain recovery against a third-party for damages."[8] That finding implies that § 2363 credit must be specifically waived, instead of bargained for in the Agreement, to be effective. That determination is an application of law and must be examined *de novo*.[9]

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[6] *Keeler v. Metal Masters Foodservice Equip. Co.*, 712 A.2d 1004, 1005 (Del. 1998).

[7] *Id*.

[8] Board Order at 3.

[9] *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 380-81 (Del. 1999).

Section 2363(e) provides an employer with a statutory entitlement when the employee is compensated by a third party tortfeasor. There is compelling public policy behind § 2363 which has long been recognized by the judiciary. That policy is to prevent the employee from obtaining double recovery.[10] And yet, that would be the result of Phillips' argument. This Court, in *McDougall v. Air Products & Chemicals, Inc.*,[11] held that the provisions of § 2363(e) are enforceable even if the employer does not assert its right to them throughout the litigation. It stated, "While § 2363 does not require that an employer give notice of a potential lien, it is possible for an employer to waive its § 2363 rights if the employers knowingly engages in conduct inconsistent with its continued assertion of those right."[12] *McDougall* makes it clear that § 2363 applies even if it is not actively pursued.

Therefore, the Court finds the statute is still applicable even if the Stipulation and Order for Commutation is silent on the issue. With the strong public policy behind the law, the Court agrees with the Board's decision that such an entitlement must be actively and affirmatively waived by the employer. Absent a waiver of that right, § 2363 is

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[10] *Harris v. New Castle County*, 513 A.2d 1307 (Del. 1986); *Moore v. General Foods*, 459 A.2d 126 (Del. 1983).

[11] 2005 WL 2155230 (Del. Super. Aug. 31, 2005).

[12] *Id.* at *10.

applicable.[13] Nothing is said in the Agreement about waiver.

A waiver is a "voluntary relinquishment of a known right or conduct such as to warrant an inference to that effect. It implies knowledge of all material facts and of one's rights, together with a willingness to refrain from enforcing those rights."[14] After finding the Board did not err when it held that Parts Depot needed to affirmatively waive its § 2363(e) credit, this Court's next inquiry turns to whether the Board's decision that it did not was supported by substantial evidence. However, the Court must determine what evidence was appropriate to consider.

Phillips argues that the Agreement and Parts Depot's November 6, 2006, letter mandate the application of the parol evidence rule.[15] "The parol evidence rule excludes evidence of additional terms to a written contract when there is a complete integration of the agreement of the parties."[16] A completely integrated agreement represents a complete

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[13] The Supreme Court held in *Baio v. Commercial Union Insur. Co.*, 410 A.3d 502 (Del. 1979) that inequitable conduct that is inconsistent with the employer's assertion of its right to a credit could operate as a waiver of that credit. There is no allegation of such conduct and the Court will not attempt to find any.

[14] *Del. Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *10 (Del. Ch. Oct. 23, 2002).

[15] It is unclear from the Philip's brief how the Board erred in its application, or lack thereof, of the parol evidence rule. Basically, Philip's first argument is a restatement of the argument that the Board rejected.

[16] *Husband (P.J.O) v. Wife (L.O.)*, 418 A.2d 994, 995 (Del. 1980).

and final expression of the parties' agreement.[17] The Court concludes that the Agreement can be viewed as integrated as a matter of law. It was a clear expression of the parties after a fairly involved negotiation between them. The Agreement was intended to be, and in fact was, submitted to the Board for approval. The Agreement is the final expression of the parties as it relates to the 2002 accident. There is no wording in the agreement expressly or impliedly indicating Parts Depot was waiving its rights to recover or get credit to which it is entitled under § 2363. On the basis of the Agreement's wording alone, the Board reached the correct result.

If the parol evidence rule is determined to apply, then the Board should have not have considered any evidence outside of the four corners of the Agreement[18] However, the rule has exceptions, one of which is arguably applicable. The parol evidence rule does not bar extrinsic evidence where the terms of the parties' agreement are ambiguous.[19] "[A] contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[20]

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[17] *Carlson v. Hallinan*, 925 A.2d 506, 522 (Del. Ch. 2006).

[18] This would include the November 2, 2006, letter that Phillips cites in support of her appeal.

[19] *Manley v. Assocs. in Obstetrics and Gynecology, P.A.*, 2001 WL 946489, at *5 (Del. Super. Jul. 27, 2001)(citing *Engle v. Oney*, 1989 WL 44045, at *2 (Del. Ch. Apr. 25, 1989)).

[20] *AT&T Corp. v. Lillis*, 953 A.2d 241, 252 (Del. 2008).

Whether a contract is ambiguous is a question of law for the Court to decide.[21] The Court will attempt to interpret the contract consistent with the parties' intent and will look to the words of the contract as the most objective indicia of intent.[22]

Paragraph 9 of Carol Clementoni's Affidavit, which is part of the Agreement, contains the following:

> I am satisfied that a lump-sum recovery is in my best interest because: I am still entitled to any and all partial disability payments in accordance with my August 22, 2002 accident and the Carrier has agreed to continue to compensate me for all my medical expenses, treatment, care etc in connection with that industrial accident.[23]

What Phillips argues is that the Board erred going outside the two documents in the Agreement, particularly the above paragraph. There are two flaws in this argument. The first is that in neither, particularly the Stipulation & Order, was there any waiver by Parts Depot of its rights under § 2363 and not even a mention of that section.

Second, the Court agrees that in the circumstances of the documents in this case, "compensate" in paragraph 9 above is ambiguous. It was, therefore, proper for the Board to consider evidence outside the two documents in the Agreement. To reach the conclusion that nothing in the Agreement constituted Parts Depot's waiver of § 2363, the

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[21] *Kelly v. Blum*, 2010 WL 629850, at *7, n. 43 (Del. Ch. Feb. 24, 2010).

[22] *Id*.

[23] Phillips' App. at A-27, ¶ 9.

Board considered the correspondence of the parties before and after the Board in 2006 agreed to the Stipulation and Waiver. There was no "conduct" by Parts Depot consistent with a waiver.

The Board paid particular attention to a pre-Stipulation letter from Parts Depot's counsel of November 2, 2006. Pertinent portions of that letter are:

> By my calculations, the total amount of the employer's credit is $78,820.00. A 29% impairments to the lumbar spine translates to 87 weeks of benefits at the claimant's workers' compensation rate of $216.48 for a total of $18,833.76. The claimant has also agreed to accept 10 weeks of benefits to resolve her disfigurement claim as a result of the surgical scarring arising from her lumbar surgery which translates to $2,164.80. The total value of the permanency and disfigurement claims is $20,998.56 which, pursuant to the terms of our agreement, will be applied to the Employer's credit of $78,820.00. Thus the Employer's remaining credit against future benefits is $57,821.44.
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> In furtherance of our settlement agreement, I am enclosing a Stipulation and Order and Affidavit for the commutation related to the February 2006 work injury. I am also enclosing an Agreement and Receipt for the permanency and disfigurement benefits (reflecting the applicable credit) with respect to the 2002 work injury. Please execute the enclosed documents and return them to me for filing with the Industrial Accident Board.
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> Finally, the Employer does not dispute that the medical treatment that the claimant has received to date was reasonable, necessary and related to the August 2002 work injury in question. Therefore, the claimant can continue to process her medical bills under the August 2002 claim.[24]

As the Board indicated, this letter meant that Parts Depot recognized the ongoing 2002 injuries still required treatment and that Phillips could submit any medical bills. But

[24] Parts Depot's App. at Ex. B-14.

the Court further notes, the letter makes it quite clear that any of those medical bills would reduce the $57,821.44 credit (arising from compensation benefits paid) it was still claiming. If anything, that is a practical way of saying what is the effect of § 2363.

The Board properly looked to evidence beyond the four corners of the Agreement and held, "[I] find first that the documents in evidence are clear as to their meaning. The evidence does not show that Employer waived its statutory entitlement to a credit for future medical expenses related back to the August 22, 2002 work accident."[25]

After finding that parol evidence were properly considered by the Board, Phillips' first and second arguments basically merge into a single assertion that the Board made an incorrect factual determination when it found that Parts Depot had not waived its statutory entitlement to a credit. The factual findings of the Board are reviewed to determine if they are supported by substantial evidence. After a thorough review of the record, particularly the exchange of letters between counsel for the parties, the Court concludes that the Board's findings are supported by substantial evidence. There is no indication from the record that, at any time, that Parts Depot agreed to waive its statutory entitlement to a credit. As stated above, the waiver must be an affirmative relinquishment of the employer's rights, or some action that is consistent with that waiver.

There is substantial evidence in the record to support the conclusion that neither of those occurred. The only evidence that supports the finding that there was a waiver is the

[25] Board Order at 4.

testimony of Phillips and her attorney during the commutation negotiations. Although evidence of one party concerning the intent of a contract can be useful to ascertain the contract's intent, the Supreme Court has acknowledged that "backward looking evidence gathered after the time of contracting is generally not helpful."[26] The Court holds that the Board's finding that Parts Depot never affirmatively waived its rights under § 2363 is supported by substantial evidence.[27]

Conclusion

For the reasons stated herein, the decision of the Industrial Accident Board is **AFFIRMED**.

IT IS SO ORDERED.

J.

[26] *Eagle Indus., Inc. v. DeVille Health Care, Inc.* 702 A.2d 1228, 1233, n.11 (Del. 1997).

[27] The Court is compelled to note that this entire controversy, counsel, Board and Court time could have been easily avoided by better draftsmanship.